

This Opinion is not a
Precedent of the TTAB

Mailed: March 24, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Centerfield Nine Corporation

Serial No. 90399980

Andrew Goldberg, President of
Centerfield Nine Corporation, pro se.

Tasha Pulvermacher, Trademark Examining Attorney, Law Office 125,
Robin Mittler, Acting Managing Attorney.

Before Wellington, Goodman and Coggins,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Centerfield Nine Corporation (“Applicant”) seeks registration on the Principal Register of the mark DEALER-FIRST BLACKJACK (in standard characters, BLACKJACK disclaimed) for “Entertainment services, namely, conducting live table games of chance and conducting games of chance via a computer network” in International Class 41.¹

¹ Application Serial No. 90399980 was filed on December 21, 2020, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). During prosecution, an amendment to allege use was filed (September

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the basis that the mark is merely descriptive of the services.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act prohibits the registration of a mark which, when used on or in connection with an applicant's goods or services, is merely descriptive of them. "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). A mark need not immediately convey an idea of each and every specific feature of the goods or services in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *In re Chamber of Commerce*, 102

11, 2021) and accepted (October 19, 2021) with Applicant claiming December 28, 2020 as its first use anywhere of the mark and May 3, 2021 as first use in commerce.

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system. Applicant's appeal brief is at 4 TTABVUE; its reply brief is at 7 TTABVUE. The Examining Attorney's brief is at 6 TTABVUE.

USPQ2d at 1219; *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Pertinent to our decision, we point out that descriptiveness must be evaluated “in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use.” *In re Bayer*, 82 USPQ2d at 1831. The determination of mere descriptiveness is not to be made in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). Rather, the question here is whether someone who knows what the services are will understand the term to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the services, the combination results in a composite that is itself merely descriptive. *See, e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372, 1374 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries,” *In re Bayer*, 82 USPQ2d at 1831, “advertising material directed to the [services],” *In re Abcor Dev.*, 200 USPQ at 218, and an applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017).

II. Evidence

A. Applicant’s Specimens:²



² September 10, 2021 Specimen.

The Most Exciting New Table Game
since Face Up Pai Gow

- ✓ increase hands-per-hour
- ✓ boost table utilization
- ✓ extend gaming sessions
- ✓ attract new players
- ✓ easy to learn and to deal
- ✓ resistant to counting

DEALER-FIRST BLACKJACK™

all hitting and standing is done AFTER
the Dealer's hand is complete!



www.dealerfirstblackjack.com

PLAYERS ♥ DEALER-FIRST™ CASINOS ♥ DEALER-FIRST™

No more hitting 15 and 16 against unknown dealer hands	Gamble alongside friends who choose to play traditional blackjack	Fewer player decisions slowing the game leads to more hands per hour	Instead of leaving, unlucky players switch rules and stay at the table
All the excitement of blackjack, without having to study "the book"	After the Dealer busts, can accept a guarantee not to lose	Two rule sets at once boosts seat utilization and reduces dead tables	Attract new customers to blackjack without pressure or intimidation
Absorb blackjack strategy from traditional players at the same table	Doubling and splitting allowed, just like conventional rules	Central Dealer-First without removing existing game from floor	Intense social bonding, like craps, over shared wins when Dealer busts
Ride streaks, then switch rules whenever luck starts to change	Always know the target score required to win the hand	Fully compatible with 6:5 or 3:2, Soft or Hard 17, and almost all side bets	Surrender option with insurance-like house adv. (ins 7.4%, surr 7.5%)
Fair odds in line with standard 21, far better than poker & carnival games	Just 3 rule adjustments, no funky pay tables, learn it in 15 seconds	Dealing procedures easy to learn & designed with surveillance in mind	Lower volatility makes Dealer-First unattractive to advantage players

How can this game be viable, allowing players to go after the Dealer?

Player hands follow 3 simple rules:

- 1. Aces always 11™**
- 2. Hit all ties**
- 3. Must exceed 13 after Dealer bust**

*After a Dealer bust, player hands over 13 automatically win.
If not, players must hit until their hand safely exceeds 13 or busts.
Risk-averse players may surrender the hand to avoid the possibility of busting, and get their initial bet back.*

House Advantage
<small>Assumes a 70% penetration, Dealer Hits Soft 17, Naturals Pay 3:2, 5:3 payouts, Late Surrender, No hitting or Re-Splitting Split Aces</small>
Conventional 0.55%
Dealer-First 0.67%

Play for free on your mobile device or computer right now! play.dealerfirstblackjack.com

B. Applicant's Responses to Information Request

Applicant provided the following information in response³ to an information request⁴ which asked:

- 1) Will the live table games of chance and/or the games of chance provided via a computer network include the game blackjack?

Response: The live games of chance and games of chance conducted via a computer network will include a game that is derived from conventional Blackjack but has numerous changes that make it a distinct gambling game. Like normal Blackjack, the players and the Dealer both start with two cards, with the goal of getting the highest score that does not exceed 21. Also like normal Blackjack, one of the

³ November 16, 2021 Response to Office Action at TSDR 3.

⁴ June 2, 2021 Office Action at TSDR 1.

dealer's first two cards is exposed and one is, initially, hidden. Also like normal Blackjack, prior to the Dealer revealing its hidden card, players will have the option to double the original wager to surrender the hand, and if the first two cards are of equal value, to split those initial cards into two distinct hands. However, the present game has a variety of specific rule changes across a number of categories: value of certain cards, mandated player actions, introducing a minimum hand value, a new surrender option, and alternating the order of play – specifically, in a reversal from traditional Blackjack, the Dealer shall “hit” its own hand (take additional cards) before the players hit theirs, thus, the Dealer will “hit” first. These rule changes, taken together, define a new game that is similar to Blackjack but is unique.

- 2) Will the dealer in the live table games of chance and/or the games of chance make the first move of the game or will the dealer deal themselves first?

Response: Neither. In the present games of chance, the players retain the “first move of the game,” just as in standard Blackjack. Such first move, is in the case when the dealer's initial exposed card is an Ace, to accept or reject the Insurance wager, and in all other cases, to choose whether to double-down, or surrender, or, when the player's two cards are of equal value, split cards into two hands, or none of the above. Alternatively, one might technically consider the first move of the game to be the players making their initial wager, which happens before the cards are dealt. Regardless, under either definition, in the present game, the first move is not made by the dealer. Also, just like in conventional Blackjack, the players will receive the first cards to be dealt. The Dealer will not “deal themselves first.” Respectfully, neither of the options presented by the Examining Attorney in the question allows for answering in the affirmative.

C. Dictionary Definitions:

The Examining Attorney provided the following dictionary definitions:

Dealer:

- 2.a. The person who distributes the cards in a game of cards.⁵

⁵ June 2, 2021 Office Action at TSDR 15, (freedictionary.com) AMERICAN HERITAGE DICTIONARY (5th ed. 2016). Similar definitions for “dealer” from other dictionary sources were also provided on the webpages. See Collins English Dictionary and Kennerman Webster's College Dictionary. *Id.* at 16.

First:

adj.

2. Coming before all others in order or location

3. Occurring or acting before all others in time; earliest

adv.

1. Before or above others in time, order, rank, or importance.⁶

D. Internet webpages

The Examining Attorney provided webpage excerpts from [udemy.com](https://www.udemy.com) and [bicyclecards.com](https://www.bicyclecards.com) relating to the blackjack card game. The Examining Attorney's webpage evidence from [udemy.com](https://www.udemy.com) was supplemented by Applicant as it was incomplete.⁷ Excerpts from these webpages explaining blackjack game play are as follows:

Bicycle ([Bicyclecard.com](https://www.bicyclecard.com))⁸

TheDeal

When all the players have placed their bets, the dealer gives one card face up to each player in rotation clockwise, and then one card face up to themselves.⁹

⁶ *Id.* at TSDR 17-18. Similar definitions for "first" from other dictionary sources were also provided on the webpages. *See* Collins English Dictionary and Kennerman Webster's College Dictionary. *Id.* at TSDR 18-19.

⁷ June 2, 2021 Office Action at TSDR 2-3 and November 16, 2021 Response to the Office Action at 10-12.

⁸ June 2, 2021 Office Action at TSDR 5-8.

⁹ *Id.* at 6.

The Play

The player to the left goes first and must decide whether to 'stand' (not ask for another card) or 'hit' (ask for another card in an attempt to get closer to a count of 21 or even hit 21 exactly).¹⁰

Settlement

Thus, one key advantage to the dealer is that the player goes first. If the player goes bust, they have already lost their wager, even if the dealer goes bust as well.¹¹

Basic Strategy

Winning tactics in blackjack require that the player play each hand in the optimum way, and such strategy always takes into account what the dealer's upcard is. When the dealer's upcard is a good one, a 7, 8, 9, 10 card, or ace for example, the players should stop drawing until a total of 17 or more is reached. When the dealer's upcard is a poor one 4, 5, or 6, the player should stop drawing as soon as he gets a total of 12 or higher. The strategy here is never to take a card if there is any chance of going bust. The desire with this poor holding is to let the dealer hit and hopefully go over 21. Finally, when the dealer's up card is a fair one, a 2 or 3, the player should stop with a total of 13 or higher. ...¹²

With a soft hand, the general strategy is to keep hitting until a total of at least 18 is reached.¹³

Udemy blog (udemy.com)¹⁴

Blackjack basics for players and dealers

The basic rules of blackjack are simple. Players try to score as close to 21 as possible without exceeding 21...blackjack is a one-on-one game between each player and the dealer. ...¹⁵

In addition to these rules, when you play as the dealer you face additional rules that limit how you can hit or stand. In most casinos, the dealer is required to hit on hands worth less than 17 points, regardless

¹⁰ *Id.*

¹¹ *Id.* at 8.

¹² *Id.*

¹³ *Id.*

¹⁴ November 16, 2021 Response to Office Action at TSDR 10-12.

¹⁵ *Id.* at 10.

of the cards that make up their hand. Hands worth 17 points, however, can't be hit on. If you're playing as the dealer and your hand is worth 17, 18, 19, 20 or 21 points, you can't hit any further and need to stand with whatever hand you've got. ...¹⁶

Before you start dealing cards

Are you ready to deal the cards? Don't act too quickly. Before you deal cards to the players, several things need to be done. First you need to shuffle your cards and if you're playing with several players, combine two or more decks together. Once your cards are shuffled, make sure all players have placed their bets. All bets need to be placed before you start dealing cards. ...¹⁷

Dealing cards for players

Start by dealing each player's first card face down. Deal the player on your left first. Then move left to right down the remaining players. Finish by dealing yourself one card face down. ...¹⁸

The players' turns

Starting from your left all of the players play their hand in turn. As the dealer, the basic rules of blackjack still apply. ...¹⁹

The dealer's turn

Once each player has had their turn, it's your turn to play. Turn over your down-facing card. If your hand is worth 16 points or less deal yourself another card and continue until it's worth 17 or more points. ... If the value of your hand exceeds 21, you're bust and the remaining players win. If your hand is worth less than 21, pay any players with a higher value than you, and collect bets from players whose hands have a lower value than yours.²⁰

III. Arguments

Applicant argues that “[t]he mark DEALER-FIRST BLACKJACK cannot be considered ‘merely descriptive’ of Applicant’s gambling game, primarily because the

¹⁶ *Id.*

¹⁷ *Id.* at 11.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 12.

mark neither describes what action, or game move, is performed first, nor the plurality of actors among whom the Dealer is first” requiring the consumer “to mentally fill in multiple blanks.” 4 TTABVUE 5. Applicant argues that “the mark is missing key information,” “has an element of incompleteness,” “fails the immediacy test,” requires “a significant amount of mental processing to parse,” and requires the consumer to “mentally add words to transform the mark into a readily comprehensible expression.”²¹ 4 TTABVUE 6, 9, 10; 7 TTABVUE 6. Applicant submits that “[a]n informed consumer who is familiar with the gambling game must still mentally recall its gameplay features, think about which distinctive characteristic is relevant here, and then mentally supply, [add words or] at the very least, a missing verb” or information before “it becomes a comprehensible expression.” 4 TTABVUE 10, 11; 7 TTABVUE 4. Applicant argues that the Examining Attorney’s own statements [relating to the descriptiveness of the mark] discredit an argument of sufficient particularity.” 4 TTABVUE 10. In particular, Applicant argues:

The Examining Attorney cannot offer up multiple candidates for the action which is to be performed first, while at the same time claiming the mark immediately describes one of them. If a consumer must decide, select or interpret the meaning among a list of possible choices, then it demands thought and/or perception. This firmly places in the mark in the “suggestive” category.

4 TTABVUE 7.

²¹ Applicant submits that “[m]ixing up the meaning of FIRST as an adjective (describing a noun, in this case, the dealer) as opposed to an adverb (describing a verb, or an action) is prima facie evidence that the mark, in its raw form, generates confusion (the opposite of descriptiveness) and requires thought and mental processing to make sense of it.” 4 TTABVUE 8.

Applicant also contends that the “Dealer hitting first is incongruous with blackjack” because it takes away the mathematical advantage to the casino for the dealer to go first and argues that the Examining Attorney disregarded the testimony from casino executive Mike May that supported its assertions of non-descriptiveness, including incongruity of the mark. 4 TTABVUE 13, 17.

The Examining Attorney argues that the terms DEALER, FIRST, and BLACKJACK separately refer to the particular aspects of the game, “such as the inclusion of a Dealer, the first moves made, and the fact that Applicant’s game is a version of blackjack.” 6 TTABVUE 4. The Examining Attorney submits that the combined term as a whole is merely descriptive because in this version of blackjack, “the dealer may make certain moves first” and “the consumer would presume there is a ‘DEALER-FIRST’ element to the game of ‘BLACKJACK.’” 6 TTABVUE 4. The Examining Attorney points to Applicant’s statements in its brief “the Dealer may hit before the players may,” “the opportunity to ‘hit’ (take an additional card) or to ‘stand’ (finalize the hand) is deferred until after the Dealer exposes its starting hand,” and the game is one “in which the dealer’s opportunity to hit precedes the players’ opportunity to do so” as further support for a finding of descriptiveness, namely that “there is a ‘DEALER-FIRST’ aspect to the game.” 6 TTABVUE 4, 10. The Examining Attorney argues that “‘DEALER-FIRST BLACKJACK’ could mean the dealer makes the first move as the first action in the game, or that the dealer goes first before all the other players.” 6 TTABVUE 7. The Examining Attorney references Applicant’s specimen as showing “various ways that the terms are descriptive,” and, for example,

shows that Applicant is basing its game on the standard game of blackjack and that “the dealer must bust first.” 6 TTABVUE 5, 6.

As to Applicant’s witness testimony, the Examining Attorney points out that “the terms must be considered in the context of the average purchaser and not an expert in the field” and there is no evidence in the record that Mr. May has legal trademark expertise to discuss terminology related to descriptiveness (“incongruity,” “mental pause,” “measure of imagination”). 6 TTABVUE 7.

As to the testimony of Mr. May, we note that although an opinion of an asserted expert may have some probative value, it is not dispositive on the ultimate determination of descriptiveness. *See Anheuser-Busch, Inc. v. Holt*, 92 USPQ2d 1101, 1106 & 1107 (TTAB 2009) (opinion of an expert in linguistics may have some probative value; “credible expert testimony ... is no substitute for evidence of how the purchasing public perceives a term ... in reaching the ultimate conclusion on the issue of mere descriptiveness.”).

IV. Analysis

As to the term BLACKJACK in Applicant’s mark, Applicant disclaimed this term when it filed its application. Applicant’s disclaimer of BLACKJACK is a concession of the term’s descriptiveness. *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005) (“it has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term ... at the time of the disclaimer.”). The term “dealer” in Applicant’s mark is defined as “the person who distributes the cards,” and the website articles submitted by the Examining Attorney and Applicant relating

to the blackjack card game discuss the dealer's role in distributing or dealing the cards. Thus, "dealer" merely describes the person who deals or distributes the cards in the blackjack game. The term "first" in applicant's mark, whether used as an adjective or an adverb, is defined as "occurring or acting before all others in time; earliest" (adj.) or "before or above others in time, order, rank, or importance" (adv.).

Applicant's response to the information request states: "in a reversal from traditional Blackjack, the Dealer shall 'hit' its own hand (take additional cards) before the players hit theirs, thus, the Dealer will 'hit' first." In addition, Applicant provided three specimens. One specimen states: "All hitting or standing is done AFTER the dealer's hand is complete." Another specimen states: "No more hitting 15 or 16 against unknown dealer hands" and "How can this game be viable allowing players to go after the Dealer?" Therefore, "first" in Applicant's mark relates to the actions of the dealer; the term "first" indicates a dealer action that occurs earlier in time than in the usual blackjack game. In this case, DEALER-FIRST indicates that the dealer finalizes his hand earlier in time than the other players, making the term "first" merely descriptive in connection with Applicant's services.

We also find that the combined term DEALER-FIRST BLACKJACK does not lose the component terms' descriptive significance when considered in relation to the services. When DEALER-FIRST BLACKJACK is viewed in the context of Applicant's services, the term immediately informs prospective customers of the fact that that a significant feature of the game is the altered order of play for the dealer in the blackjack game.

Applicant's response to the information request and its own marketing materials support this interpretation. Applicant's specimens indicate that the players hit or stand "AFTER the dealer's hand is complete." Another specimen indicates that the rules are "allowing players to go after the Dealer" and that the players are not hitting "15 or 16 against unknown dealer hands." The information provided in the specimens makes clear that in Applicant's blackjack game, the dealer finalizes his hand, first, before the players. We find this compelling evidence in support of the descriptiveness of both the individual terms and the mark as a whole. *See In re N.C. Lottery*, 123 USPQ2d at 1710 (relying on the applicant's explanatory text in its specimen as "supplying commercial context" for the descriptiveness inquiry); *In re Abcor Dev.*, 200 USPQ at 218 ("Evidence of the context in which a mark is used in labels, packages, or advertising materials directed to the goods is probative of the reaction of prospective consumers to the mark."); *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1955 (TTAB 2018) ("explanatory text from Applicant's own specimen makes clear that it produces a specific type of malt known as "floor-malted" malt and that Applicant's grain processing services substitute mechanization for traditional floor-malting techniques"); *In re Carlson*, 91 USPQ2d 1198, 1202 n.5 (TTAB 2009) ("Of course, specimens and promotional material may be used to prove that a mark is merely descriptive, and statements made in them can show that a term describes a feature or characteristic of the goods or services.").

Applicant argues the mark is incongruous, but we find no incongruity in the mark resulting from the altered state of play for the dealer from the traditional blackjack

game. Although the concept of a dealer ‘hitting’ or ‘standing’ first is contrary to conventional blackjack rules, the term DEALER-FIRST is not incongruous in the context of Applicant’s services; rather, it directly informs the consumer about a key aspect of the game to be played and how it differs from conventional blackjack. Applicant also maintains that it requires imagination and a mental pause for consumers to understand what dealer action in its blackjack game comes first. However, we find that consumers encountering the term DEALER-FIRST BLACKJACK in connection with the services, would immediately recognize the term as describing a significant feature of the services in which the dealer finalizes his hand first based on an altered order of play.

Lastly, the fact that Applicant may be the first and only user of the term for such services does not obviate a mere descriptiveness refusal. “Being ‘the first and only one to adopt and use the mark sought to be registered does not prove that the mark is not descriptive.’” *In re The Swatch Grp. Mgmt. Servs. AG*, 110 USPQ2d 1751, 1761 n.50 (TTAB 2014) (quoting *In re Bailey Meter Co.*, 102 F.2d 843, 41 USPQ 275, 276 (CCPA 1939)); *see also In re Nat’l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983) (the fact that applicant may be the first and only user of a descriptive designation “does not justify registration if the term projects only merely descriptive significance”).

Decision: The Section 2(e)(1) refusal to register Applicant’s DEALER-FIRST BLACKJACK mark is affirmed.